

ORIGINAL

Before the  
SURFACE TRANSPORTATION BOARD

232349

Finance Docket No. 35412

MIDDLETOWN & NEW JERSEY RAILROAD, LLC--LEASE AND  
OPERATION EXEMPTION--NORFOLK SOUTHERN RAILWAY COMPANY

ENTERED  
Office of Proceedings

MAY 23 2012

Part of  
Public Record

PETITION TO REOPEN



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May 22, 2012

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SURFACE TRANSPORTATION BOARD

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Preliminary Statement

Samuel J. Nasca,<sup>1/</sup> for and on behalf of United Transportation Union-New York State Legislative Board (UTU-NY), petitions the Surface Transportation Board (STB), that the STB reopen its decision in the captioned proceeding, dated May 1, 2012 (served May 2), on the ground of material error. 49 CFR 1115.4. Middletown & New Jersey Railroad, LLC-Lease and Operation Exemption-Norfolk Southern Railway Company.

The proceeding involves the Notice of Exemption, filed under the class exemption for carrier exemption from the provisions of 49 U.S.C. §10902, for the lease and operation of lines of another carrier. 49 CFR 1150.41, et seq. Here, Middletown & New Jersey Railroad, LLC (M&NJ), on August 31, 2010, filed its notice to

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<sup>1/</sup> New York State Legislative Director for United Transportation Union, with offices at 35 Fuller road, Albany, NY 12205.

lease five lines of Norfolk Southern Railway Company (NSR), and in conjunction therewith a sublease and various assignments with New York Susquehanna & Western Railway (NYS&W), together with incidental trackage rights over NSR, all in New York State.

The STB on December 23, 2010, instituted a proceeding to consider the UTU-NY petition to revoke.<sup>2/</sup> In addition to UTU-NY, submissions were made by M&NJ and NSR. Thereafter, STB on September 22, 2011 (served September 23), denied the UTU-NY petition to revoke the exemption. UTU-NY sought reconsideration, which was denied by decision served May 2, 2012.

The STB is requested to find that the May 2, 2012 decision constitutes material error. 49 CFR 1115.4.

#### ARGUMENT

I. THE MERE PERFORMANCE OF CAR STORAGE--  
WHETHER EMPTY OR LOADED CARS--DOES NOT  
CONSTITUTE CARRIER TRANSPORTATION  
WHICH QUALIFIES UNDER 49 U.S.C. §10902.

M&NJ, as a non-carrier, filed a §10901 exemption notice to acquire a 6.5-mile line between Middletown and Slate Hill, NY, effective April 5, 2009. Middletown and New Jersey Railroad, LLC-Acquisition and Operation Exemption-Middletown & New Jersey Railway Co., Inc., 74 Fed. Reg. 11995-96 (Mar. 20, 2009).<sup>3/</sup>

The evidence as to actual transportation by M&NJ during the

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<sup>2/</sup> STB earlier on September 29, 2010 temporarily stayed the notice of exemption, which subsequently was lifted October 6, 2010.

<sup>3/</sup> M&NJ is an affiliate of Regional Rail, Inc. and East Penn Railroad, LLC. Finance Docket No. 35228, Regional Rail, LLC-Continuance in Control Exemption-Middletown and New Jersey Railroad, LLC, 75 Fed. Reg. 11996. (Mar. 20, 2009).

period April, 2009-August 2010 is in dispute. Section 10902 may be invoked by a Class III "rail carrier providing transportation subject to the jurisdiction of the Board..."

(a) A Class II or Class III rail carrier providing transportation subject to the jurisdiction of the Board under this part may acquire or operate an extended or additional rail line under this section only if the Board issues a certificate authorizing such activity under subsection (c).

UTU-NY challenged the performance of any M&NJ freight transportation during the pre-notice period, which would be required to invoke the §10902 carrier class exemption. In its September 23, 2011 decision, the STB initially ruled M&NJ became a "rail carrier" on the date of line acquisition, rather than on the date it commenced rail operations or published information in the ORSL or ORG. (Decision, 9/23/01, at 4).

However, on reconsideration, the STB did not follow its "Notice" view to establish carrier or transportation standing. Instead, the STB referred to interchange reports prepared by Railinc--a disinterested party--indicating M&NJ had begun interchanging traffic with NSR, the data showing numerous empty and loaded cars. The Board surmises that UTU-NY believes all of the interchanged cars must have been empty cars destined to or from storage. (Decision, 5/2/12, 4-5).

The May 2 decision constitutes material error. First, there is no basis for speculation that the UTU-NY position is confined to M&NJ empty car storage traffic. Second, storage movement may be either loaded or empty cars. Indeed, M&NJ on its website advertizes loaded as well as empty car storage. The Board has recognized

that car storage movement is not track utilization for freight transportation. Storage movement does not constitute transportation subject to the Board's jurisdiction. Indeed, car storage is not even jurisdictional traffic for §10903 purposes. See: AB-1073, Alabama & Florida Ry. Co., Inc.-Abandonment Exemption-in Geneva, Coffee and Covington Counties, Ala., at ln.1 (served Aug. 9, 2011); AB-1065, Indiana Southwestern Railway Co.-Abandonment Exemption-In Posey and Vanderburgh Counties, Ind., at ln.1 (served Dec, 23, 2010).

The May 2 decision constitutes material error. The provision of loaded car storage does not constitute a "carrier providing transportation subject to the Board's jurisdiction." Interchange of loaded storage cars does not qualify M&NJ as an entity to invoke the §10902 acquisition class exemption.

II. ON REOPENING, THE BOARD SHOULD REVOKE  
THE EXEMPTION AND REQUIRE FURTHER DATA

The Board should revoke the exemption in light of the lack of demonstrated evidence that M&NJ at the time it filed its Notice under the §10902 class exemption was a carrier providing transportation subject to the Board's jurisdiction. M&NJ, of course, could attempt a petition for exemption or an application.

In its decision the Board should indicate its preference for better data from M&NJ and NSR as to movements on the M&NJ line during the pre-notice period.

CONCLUSION

The STB should find the May 2, 2012 decision constitutes material error, and thereupon revoke the exemption for the noticed transaction.

Respectfully submitted,



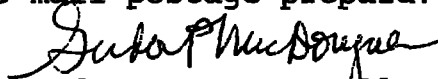
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May 22, 2012

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Certificate of Service

I hereby certify I have served a copy of the foregoing upon all parties of record by first class mail postage-prepaid.



Washington DC

Gordon P. MacDougall